



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of: )  
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----- ) ISCR Case No. 14-00939  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Stephanie C. Hess, Esq., Department Counsel  
For Applicant: *Pro se*

10/23/2014

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny him a security clearance to work in the defense industry. The security concerns stemming from his marijuana use and his misrepresentations about his illegal drug involvement are sufficiently mitigated. Accordingly, this case is decided for Applicant.

**Statement of the Case**

Applicant completed and submitted an application for a security clearance on November 27, 2013.<sup>1</sup> After reviewing the application and information gathered during a background investigation, the Department of Defense (DOD), on May 1, 2014, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him access to classified

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<sup>1</sup> Exhibit 4.

information.<sup>2</sup> The SOR is similar to a complaint. It detailed the reasons for the action under the security guidelines known as Guideline E for personal conduct and Guideline H for drug involvement. Applicant answered the SOR on May 19, 2014. Neither Applicant nor Department Counsel requested a hearing, and so, the case will be decided on the written record.<sup>3</sup>

On August 20, 2014, Department Counsel submitted all relevant and material information that could be adduced at a hearing.<sup>4</sup> This so-called file of relevant material (FORM) was mailed to Applicant, who received it September 3, 2014. Applicant's timely reply to the FORM consists of a one-page letter, which is admitted as Exhibit A. The case was assigned to me October 20, 2014.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted all the allegations. His admissions are incorporated in the findings of fact.

Applicant is a 55-year-old employee who is seeking to obtain a security clearance. He has been employed as a physicist 1 with the same company since 1983. His first marriage ended in divorce and he remarried in 2008. He has two children from his first marriage, both of whom are now adults.

The DOD granted Applicant a secret-level security clearance in 1984.<sup>5</sup> He held a clearance until about 2007, when his eligibility was revoked due to his untruthfulness about his past use of marijuana.<sup>6</sup> He applied for a security clearance in 2013 at the request of his employer, after deciding "it was worth" going through the security clearance process because he believes he "can make a difference in helping and supporting our war fighters."<sup>7</sup>

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<sup>2</sup> This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

<sup>3</sup> Directive, Enclosure 3, ¶ E3.1.7.

<sup>4</sup> The file of relevant material consists of Department Counsel's written brief and supporting documents, some of which are identified as evidentiary exhibits in this decision.

<sup>5</sup> Exhibit 4 at 29–30.

<sup>6</sup> Exhibit 4 at 31.

<sup>7</sup> Exhibit A.

In his November 2013 security clearance application,<sup>8</sup> Applicant disclosed the following information about his illegal drug involvement:

- That he was charged in February 2005 with the offenses of open container of alcohol in a vehicle and misdemeanor possession of marijuana. The possession charge was dropped or dismissed and he paid a fine for the open container charge.
- That he used marijuana a few times annually, which he described as recreational use of marijuana, from about January 1984 to February 2006, a period of more than 20 years, while possessing a security clearance.
- That his security clearance was revoked in 2007 because he had been untruthful about his past marijuana use.

In his answer to the SOR, Applicant admitted that he falsified a February 2000 security clearance application<sup>9</sup> when he answered in the negative to a question asking about using illegal drugs within the last seven years. Second, he admitted that he falsified an October 2005 security clearance application<sup>10</sup> when he answered a question about his police record by disclosing the February 2005 open container offense but omitting the marijuana offense. Third, he admitted that he falsified the same October 2005 security clearance application when he answered in the negative to a question asking about using illegal drugs within the last seven years. And fourth, he admitted using marijuana with varying frequency during 1984–2006 while in possession of a security clearance. In addition to his admissions, he expressed remorse, he offered no excuses, and he accepted responsibility for his actions.

### **Law and Policies**

It is well-established law that no one has a right to a security clearance.<sup>11</sup> As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>12</sup> Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

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<sup>8</sup> Exhibit 4.

<sup>9</sup> Exhibit 6.

<sup>10</sup> Exhibit 5.

<sup>11</sup> *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10<sup>th</sup> Cir. 2002) (no right to a security clearance).

<sup>12</sup> 484 U.S. at 531.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.<sup>13</sup> An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.<sup>14</sup>

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.<sup>15</sup> The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.<sup>16</sup> An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>17</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>18</sup> In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.<sup>19</sup> The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.<sup>20</sup>

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.<sup>21</sup> Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

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<sup>13</sup> Directive, ¶ 3.2.

<sup>14</sup> Directive, ¶ 3.2.

<sup>15</sup> ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

<sup>16</sup> Directive, Enclosure 3, ¶ E3.1.14.

<sup>17</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>18</sup> Directive, Enclosure 3, ¶ E3.1.15.

<sup>19</sup> *Egan*, 484 U.S. at 531.

<sup>20</sup> ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

<sup>21</sup> Executive Order 10865, § 7.

## Discussion

### 1. The drug involvement allegation

Applicant's history of illegal drug involvement (consisting of use and possession of marijuana) is disqualifying under the drug involvement guideline.<sup>22</sup> The evidence shows he engaged in drug abuse by using marijuana for more than 20 years during 1984–2006. Moreover, he used marijuana after being granted a security clearance, which is a breach of trust.<sup>23</sup> His drug abuse reflects negatively on his judgment, reliability, trustworthiness, and willingness to follow laws, rules, and regulations.

There are four mitigating conditions to consider under Guideline H.<sup>24</sup> First, the mitigating condition in AG ¶ 26(a) applies because Applicant's marijuana use happened so long ago—he last used marijuana more than eight years ago in early 2006—that it does not cast doubt on his current reliability, trustworthiness, or good judgment. Second, the mitigating condition in AG ¶ 26(b) applies because Applicant has demonstrated an intention not to engage in drug abuse in the future as shown by the eight-year period of abstinence from marijuana use. The other two mitigating conditions are inapplicable to the facts of this case. In addition, Applicant receives credit for disclosing his illegal drug involvement in his 2013 security clearance application and during the security clearance process. By doing so, he did what is expected of a person seeking access to classified information.

### 2. The personal conduct allegations

Applicant's falsifications of the February 2000 and October 2005 security clearance applications and the marijuana use while in possession of a security clearance are disqualifying under the personal conduct guideline.<sup>25</sup> With that said, the negative security implications of engaging in drug abuse while in possession of a security clearance are discussed above under Guideline H and will not be repeated here. The falsifications of two security clearance applications, however, are significant. He gave false answers to multiple questions in an effort to conceal his illegal drug involvement, which is serious misconduct that is not easily explained away, excused, or mitigated.

There are seven mitigating conditions to consider under Guideline E.<sup>26</sup> First, the mitigating condition in AG ¶ 17(c) applies because the multiple falsifications occurred

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<sup>22</sup> AG ¶¶ AG 25(a) and (c).

<sup>23</sup> AG ¶ 25(g).

<sup>24</sup> AG ¶ 26(a)–(d).

<sup>25</sup> AG ¶¶ 16(a), 16(c), and 16(e).

<sup>26</sup> AG ¶¶ 17(a)–(g).

when he completed the security clearance applications in 2000 and 2005, which is 14 and 9 years ago, respectively. Given the passage of time, coupled with Applicant's full disclosure in his 2013 security clearance application, the multiple falsifications do not cast doubt on his current reliability, trustworthiness, or good judgment. Second, the mitigating condition in AG ¶ 17(e) applies because, by fully disclosing his history of illegal drug involvement in his 2013 security clearance application, he took substantial, positive steps to reduce if not eliminate any vulnerability to exploitation, manipulation, or duress. The remaining mitigating conditions are inapplicable to the facts of this case.

Taken together, Applicant's history of illegal drug involvement and personal conduct do not justify current doubt about his judgment, reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I considered the whole-person concept.<sup>27</sup> I also weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. Accordingly, I conclude he has met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

### **Formal Findings**

The formal findings on the SOR allegations are:

Paragraph 1, Guideline E:	For Applicant
Subparagraphs 1.a–1.d:	For Applicant
Paragraph 2, Guideline H:	For Applicant
Subparagraph 2.a:	For Applicant

### **Conclusion**

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Michael H. Leonard  
Administrative Judge

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<sup>27</sup> AG ¶ 2(a)(1)–(9).